THE FAIR CREDIT REPORTING ACT: ARE BUSINESS CREDIT REPORTS REGULATED?

Since World War II the consumer credit industry has experienced a phenomenal and continuing growth,[1] paralleled by the development of the credit information industry[2] upon which credit grantors rely in order to minimize the risks inherent in the extension of credit.[3] Credit bureaus typically supply information on a person's financial position, his payment record with respect to bills and loans, and public record information,[4] but may also provide information on a person's habits, character and morals.[5] Technological innovations in data processing and storage techniques have increased the capacity of credit bureaus to handle large volumes of such information, but have correspondingly increased the potential for abuse or error.[6] The lack of sufficient safeguards against abuse or error generated a considerable amount of

1. In 1945 the American consumer owed less than $6 billion. By 1969 he owed more than $116 billion. S. REP. No. 517, 91st Cong., 1st Sess. 2 (1969). See Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROB. 641, 641-45 (1968).

THE FOLLOWING HEREINAFTER CITATIONS ARE USED IN THIS ARTICLE:

BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION (DIVISION OF SPECIAL PROJECTS), COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *reprinted in* 4 CCH CONSUMER CREDIT GUIDE ¶ 11,304, at 59,781 (1971) [hereinafter cited as COMPLIANCE WITH FCRA];

CONF. REP. No. 1587, 91st Cong., 2d Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 4411 (1970) [hereinafter cited as CONF. REP.];

S. REP. No. 517, 91st Cong., 1st Sess. 2 (1969) [hereinafter cited as S. REP. No. 517].

2. "Credit bureaus maintain files on more than 110 million individuals and in 1967 issued over 97 million credit reports." S. REP. No. 517, at 2.

3. Credit reports are also used by employers to obtain information about prospective employees. Note, *Fair Credit Reporting Act*, 23 MAINE L. REV. 253, 254 n.9 (1971). Likewise included within the scope of this discussion are reports used for the purpose of determining eligibility for insurance. See note 5 *infra*.

4. S. REP. No. 517, at 2.

5. Information on habits, character and morals is obtained largely through interviews with neighbors, co-workers and other acquaintances for insurance reports, *id.*, but may also be used in credit reports. Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509 n.5 (1969). The same firm may handle both credit and insurance reports. *Id.*

6. See Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1145-51 (1969); Comment, *The Consumer vs. the Credit Bureau: Whom Does the Law Protect?*, 7 CALIF. W.L. REV. 216-18 (1970).

public attention,[7] including extensive congressional hearings,[8] and culminated in the adoption of the Fair Credit Reporting Act (FCRA).[9]

The FCRA became effective on April 25, 1971.[10] Much of the commentary on the Act has been limited to criticisms of the adequacy of the protection provided the consumer.[11] Little detailed considera-

7. Perhaps the most notorious incident calling public attention to the problems of the credit information industry was a CBS News broadcast by Correspondent Mike Wallace on March 17, 1969. CBS News established a dummy corporation located at a rented mailbox. Using stationery bearing the corporation's name, letters were sent to twenty credit bureaus requesting reports on individuals whose names had been selected at random from telephone books. The letters indicated that the corporation wished to grant them credit. Without further ado or questions ten of the twenty bureaus mailed reports on the individuals involved back to the fictitious corporation. The film describing this sequence of events was interspersed with sequences in which the Executive Director of the Associated Credit Bureaus of America was stating that credit reports were available only to legitimate grantors of credit who were checked by credit bureaus if they were not known to the agency from whom the report had been requested. The verbal transcript of the dialogue in this film is set forth in *Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 59-61 (1970).

8. Both the House of Representatives and the Senate had hearings on the subject of credit reporting on more than one occasion. See *Hearings on H.R. 16340, supra* note 7; *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. (1969); *Hearings on S. Res. 233 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1969); *Hearings on Commercial Credit Bureaus Before a Special Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 90th Cong., 2d Sess. (1968).

9. The FCRA §§ 601-22, 15 U.S.C. §§ 1681-81t (1970) was enacted as part of the Act of Oct. 26, 1970, Pub. L. No. 91-508, 84 Stat. 1114. The first four titles of this legislation were intended to assist in the detection of white-collar crime and the illegal transfer of funds to secret foreign bank accounts. These titles require financial institutions to maintain certain records and report certain financial transactions to the Department of the Treasury. H.R. REP. NO. 975, 91st Cong., 2d Sess. 1 (1970); 116 CONG. REC. S17632-33 (daily ed. Oct. 9, 1970) (remarks of Senator Proxmire). Title V, which regulates the issuance of credit cards and creates liability for their unauthorized use, and Title VI, the Fair Credit Reporting Act, are both non-germane to the first four titles, having been added to the Senate version of the bill shortly before Congress adjourned in 1970. See colloquy and action of the Senate in 116 CONG. REC. S15999-S16005 (daily ed. Sept. 18, 1970). The House representatives on the Conference Committee agreed, with certain modifications, to the addition of titles V and VI to the Act, CONF. REP., at 4414-16, notwithstanding resentment by certain House members toward the tactics employed by the Senate. 116 CONG. REC. H10053-56 (daily ed. Oct. 13, 1970) (remarks of Congressmen Bow, Widnall, and Wylie). For a colorful discussion of the instrumental role played by Senator Proxmire in adoption of the Fair Credit Reporting Act see Denney, *Federal Fair Credit Reporting Act*, 88 BANKING L.J. 579 (1971).

10. The FCRA became effective 180 days after its enactment. Act of Oct. 26, 1970, § 602, 84 Stat. 1136.

11. See Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1061-69 (1971); *Fair Credit Reporting Act, supra* note 3, at 257-64; Comment, *Agency Access to Credit Bureau Files: Federal Invasion of Privacy?*, 12 B.C. IND. & COM. L. REV. 110, 123-24 (1970).

tion, however, has been given to the actual workings of the FCRA[12] and the potential problems in its interpretation. The purpose of this note is to examine the provisions of the FCRA with a view toward pointing out one such interpretive problem, namely, the applicability of the FCRA to credit reports prepared on businesses.

The Provisions of the FCRA

The FCRA is intended to ensure that consumer reporting agencies[13] dispense information in a manner which is fair and equitable to the consumer,[14] "with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . ."[15] This statement of purpose was based on congressional findings that accurate credit reporting is vital to the banking system,[16] that credit reporting agencies play an important role in determining the eligibility of consumers to receive credit,[17] and that a need existed for legislation to ensure that the credit system operated fairly toward consumers.[18] Specifically the FCRA is designed to provide the consumer with certain rights vis-à-vis credit reporting agencies and the users of credit

12. One exception is Koon, *Translating the Fair Credit Reporting Act*, 48 DENVER L.J. 51 (1971). *But see* note 90 *infra*.

13. A "consumer reporting agency" is any entity which "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." FCRA § 603(f), 15 U.S.C. § 1681a(f) (1970). No authoritative interpretation of the word "regularly" is available, although the FTC staff has indicated that an institution which from "time to time" issues consumer reports will be considered a consumer reporting agency. COMPLIANCE WITH FCRA ¶ 11,305, at 59,787. However, in the *Guidelines for Financial Institutions in Complying with Fair Credit Reporting Act* (prepared jointly by the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board), 4 CCH CONSUMER CREDIT GUIDE ¶ 11,203, at 59,757, the word "regularly" is underscored in such a way as to suggest that institutions which issue consumer reports only in isolated instances will not be so considered.

14. The word "consumer" means "an individual." FCRA § 603(c), 15 U.S.C. § 1681a(c) (1970).

15. FCRA § 602(b), 15 U.S.C. § 1681(b) (1970) (congressional statement of purpose).

16. *Id.* § 602(a)(1), 15 U.S.C. § 1681(a)(1) (1970). See note 8 *supra*.

17. *Id.* § 602(a)(3), 15 U.S.C. § 1681(a)(3) (1970).

18. *Id.* § 602(a)(4), 15 U.S.C. § 1681(a)(4) (1970). More specifically, the Senate Committee on Banking and Currency delineated seven problems which needed correction: (1) the inability of the consumer to know he is being damaged by an adverse credit report; (2) the inability of the consumer to get access to the information in his file even if he knows the name of the credit reporting agency which has supplied an adverse report; (3) the difficulty in having inaccurate information in a file corrected, even if access thereto has been gained; (4) the failure of the

reports[19] by specifying certain procedures to which credit reporting agencies and users of credit reports must adhere, limiting the permissible uses of the consumer report, and providing machinery for the enforcement of the above provisions of the Act.

Procedures required by the act. When a consumer is adversely affected by information contained in a consumer report, the user of the report must notify him of the adverse action and provide him with the name and address of the agency making the report.[20] The con-

industry to maintain information in strict confidence; (5) the inclusion of highly subjective information of a personal and sensitive nature which may be only marginally related to credit worthiness and which may unreasonably invade an individual's privacy; (6) the failure to keep public record information included on credit reports up to date; and (7) the inability of the subject of an adverse credit report to overcome the stigma which attaches, so that even though his performance subsequently improves, he may be faced with having his earlier poor performance on his record permanently. See S. REP. NO. 517, at 3-4.

19. Senator Proxmire aptly summarized the "rights" provided the consumer by the FCRA in describing the bill to the Senate as follows:

> First. To be told the reasons for a credit, insurance or employment turndown when a credit report was a factor and to be given the name and address of the reporting agency.
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> Second. To be informed on the nature and substance of all information in his credit file by the credit reporting agency.
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> Third. To have another person with him at the reporting agency when his file is discussed.
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> Fourth. To be told who has received reports on him during the proceeding [sic] 6 months for credit or insurance purposes and the preceeding [sic] 2 years for employment purposes.
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> Fifth. To have inaccurate or unverifiable information deleted from his file.
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> Sixth. To have the information in his file reinvestigated whenever he disputes its accuracy.
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> Seventh. To file a brief explanatory statement on disputed items and to have the statement included on subsequent reports.
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> Eighth. To have the information in his file kept confidential and used only for legitimate business purposes.
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> Ninth. To have personal information in his file kept from governmental agencies unless ordered by a court.
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> Tenth. To be informed if adverse public record information is reported for employment purposes when such information cannot be kept up to date.
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> Eleventh. To have adverse information deleted from his file after 7 years or after 14 years in the case of bankruptcies.
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> Twelfth. To be informed of the scope and nature of investigative-type reports into his personal life.
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> Thirteenth. To have adverse information on investigative-type reports reverified before it can be used again.
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> Fourteenth. To bring civil actions against credit reporting agencies and collect actual damages plus attorney's fees if the agency is negligent in reporting inaccurate information. 116 CONG. REC. S17635-36 (daily ed. Oct. 9, 1970).

20. FCRA § 615, 15 U.S.C. § 1681m(a) (1970). § 1681m(a) (1970). This requirement is also applicable when the charge for credit or insurance is increased because of the contents of a consumer report. *Id.*

sumer may then contact the reporting agency and, upon proper identification, the agency is required to disclose the "nature and substance of all information (except medical information) in its files on the consumer" at the time the request is made,[21] including the sources of such information.[22] In addition, the reporting agency must furnish the names of any persons who have received a report on the consumer within the last six months,[23] unless the report was for employment purposes, in which case the identity of any persons receiving it within the prior two years must be disclosed.[24]

Upon giving a consumer access to his file,[25] the reporting agency is required to provide trained personnel to explain its contents to

21. FCRA § 609(a)(1), 15 U.S.C. 1681g(a)(1) (1970). There is some question as to what the words "nature and substance" mean. It is apparently agreed that this language does not give the consumer the right to physically handle his file. CONF. REP., at 4415. The Conference Report on the bill indicates that the intent of the provision is to require disclosure of all information, *id.*, a reading confirmed by the discussion of the language of the provision on the House floor. 116 CONG. REC. H10051-52 (daily ed. Oct. 13, 1970) (remarks of Congresswoman Sullivan). *See also* Excerpts from FTC Informal Staff Opinion Letter of April 8, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,522 (1971). *But see* 116 CONG. REC. S17637 (daily ed. Oct. 9, 1970) (remarks of Senator Bennett).

The term "medical information" is limited to records obtained from physicians, other practitioners, or hospitals and clinics which are obtained *with the consent* of the consumer to whom they relate, FCRA § 603(i), 15 U.S.C. § 1681a(i) (1970), and does not include comments on a consumer's health by non-medical personnel. COMPLIANCE WITH FCRA ¶ 11, 306, at 59,793-94. The reasons for exempting medical information from disclosure were that raw medical information should be tendered to a consumer only with the counsel of a physician, CONF. REP., at 4414, and that it was necessary to protect the traditional physician-patient relationship. 116 CONG. REC. S17634 (daily ed. Oct. 9, 1970) (remarks of Senator Proxmire). Neither of these reasons appears to have much substance. A consumer is probably as well qualified to interpret medical data about himself as the average credit bureau or credit grantor. Moreover, if a reporting agency does have medical data, it necessarily would have been acquired with the consent of the consumer, under the terms of the Act, and the issue of confidentiality would not come into play.

22. FCRA § 609(a)(2), 15 U.S.C. § 1681g(a)(2) (1970). The sources of information acquired solely for use in "investigative consumer reports" are exempted from the disclosure requirements, but are available to the plaintiff under appropriate discovery procedures in court actions. *Id.* Investigative reports are discussed in the text accompanying notes 33-40 *infra*.

23. FCRA § 609(a)(3)(B), 15 U.S.C. § 1681g(a)(3)(B) (1970).

24. *Id.* § 609(a)(3)(A), 15 U.S.C. § 1681g(a)(3)(A) (1970). When a credit grantor denies credit for personal, household or family purposes on the basis of information obtained from a third party other than a consumer reporting agency he, too, is required to disclose the nature of the information which led to his decision if the consumer so requests within 60 days of the adverse action. FCRA § 615(b), 15 U.S.C. § 1681m(b) (1970). This provision, notably, does not extend to denials of employment or insurance resulting from a communication from a non-consumer reporting agency, *see* FCRA § 615(a), 15 U.S.C. § 1681m(a) (1970), a limitation that has justly been described as "nonsensical," *see* Koon, *supra* note 12, at 63.

25. The disclosure described in the foregoing paragraph must be made during normal

him.[26] If the consumer disputes the completeness or accuracy of any item contained in his file, the reporting agency is required to reinvestigate the matter unless it has reasonable grounds to believe that the complaint is frivolous.[27] If the reinvestigation reveals that the contested information is inaccurate, or if it cannot be verified, the information must be deleted from the consumer's file.[28] When the reinvestigation does not resolve the disagreement to the satisfaction of the consumer, he is permitted to prepare a summary of the dispute[29] which must be included in any subsequent report that contains the disputed information.[30] Such a statement may be limited to one hundred words if the reporting agency assists the consumer in preparing the written statement.[31] The reporting agency is required to furnish notification of any correction made on the report to anyone designated by the consumer who has received a report within the last six months, or who has received a report for employment purposes within the prior two years.[32]

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business hours after reasonable notice by the consumer. FCRA § 610(a), 15 U.S.C. § 1681h(a) (1970). The consumer may receive the information in person or by telephone if he has made a written request in advance, after providing reasonable identification in each case. FCRA § 610(b), 15 U.S.C. § 1681h(b) (1970). Further, he may be accompanied by one person of his choosing when receiving such information. *Id.* § 610(d), 15 U.S.C. § 1681h(d) (1970).

It has been stated that the Act "does not require the bureau even to notify subjects of the *location* of the report" (emphasis original) and that "[t]his omission emasculates the disclosure requirement." Note, 80 YALE L.J., *supra* note 11, at 1064. It is not immediately apparent what value there is in knowing the location of the report or how its omission emasculates the disclosure requirement, particularly since the location of the report is increasingly likely to be in the memory bank of a computer. More to the point is whether the consumer is actually able to learn the contents of his file.

26. FCRA § 610(c), 15 U.S.C. § 1681h(c) (1970).

27. *Id.* § 611(a), 15 U.S.C. § 1681i(a) (1970). The statute provides that "the presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous . . . ." *Id.*

28. *Id.*

29. *Id.* § 611(b), 15 U.S.C. § 1681i(b) (1970).

30. *Id.* § 611(c), 15 U.S.C. § 1681i(c) (1970). This provision again, is not applicable if there are reasonable grounds for believing the dispute is frivolous. *Id.* It appears designed to encourage reporting agencies to expunge contested information since they may avoid including a consumer's statement in subsequent reports by doing so.

31. *Id.* § 611(b), 15 U.S.C. § 1681i(b) (1970). It has been suggested that the merits of including a consumer's statement in a consumer report is at best debatable because users of such reports will give such statements little credence, if any. Comment, *The Consumer vs. the Credit Bureau: Whom Does the Law Protect?*, *supra* note 6, at 234. While this argument is persuasive, it must be noted that credit grantors presumably want to extend credit and thereby do business, rather than the contrary, and that this factor may offset the former.

32. FCRA § 611(d), 15 U.S.C. § 1681i(d) (1970). These procedures are carried out at the expense of the reporting agency if the consumer has requested disclosure within thirty days of

Investigative consumer reports[33] are subject to the same disclosure requirements as other consumer reports,[34] "except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed."[35] The latter provision was deemed necessary to protect the sources of personal information.[36] Whenever an investigative report on a consumer is requested, however, the consumer must be advised that an investigation of his character, general reputation, and mode of living may be made.[37] Such notice must also advise the consumer that he is entitled to a further disclosure[38] detailing the nature and scope of the investigation which may be conducted.[39] Finally, adverse

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the time he was notified that an adverse decision had been made on the basis of the report. *Id.* § 612, 15 U.S.C. § 1681j (1970). If he does not request disclosure until after thirty days the reporting agency may impose a reasonable charge for both disclosure and notification of corrections, except that no charge may be made for notification that information which was inaccurate or which could not be verified was deleted. When such a charge is made it may not exceed that imposed upon the recipient of a consumer report. *Id.*

33. The term "investigative consumer report" is defined as "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates," but not including factual information on a consumer's credit record received from creditors or from a reporting agency which obtained the information from a creditor or the consumer himself. FCRA § 603(e), 15 U.S.C. § 1681a(e) (1970). This definition creates obvious difficulties in that a reporting agency must distinguish between what is subjective opinion, and what is factual information, a matter undoubtedly open to subjective judgment. See COMPLIANCE WITH FCRA ¶ 11,304, at 59,787. In an interesting staff opinion the FTC has determined that reports on interviews conducted with the members of a consumer's immediate family are not investigative reports because these are not the type of third parties contemplated by the statute, even though a consumer is "acquainted" with such persons. Excerpts from FTC Informal Staff Opinion Letter of May 20, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,425 (1971).

34. This is clear from the definition of an investigative consumer report, see note 33 *supra*, and from the fact that specific reference is made to investigative reports under the consumer report disclosure provisions. *See* FCRA § 609(a)(2), 15 U.S.C. § 1681g(a)(2) (1970). *See also* COMPLIANCE WITH FCRA ¶ 11,304, at 59,787, which indicates that an investigative report is a type of consumer report.

35. FCRA § 609(2), 15 U.S.C. § 1681g(2) (1970). *But see* note 24 *supra*.

36. *Cf. Hearings on S. 823, supra* note 8, at 173 (statement of W. Lee Burge, President, Retail Credit Co., Atlanta, Ga.).

37. FCRA § 606(a)(1), 15 U.S.C. § 1681d(a)(1) (1970). Such notice must be given by a letter mailed or otherwise delivered within three days. *Id.* Presumably the reason why the notification must indicate that an investigation "may be made," rather than that it "will be made" is because a reporting agency may already have a current investigative report on hand.

38. *Id.*

39. *Id.* § 606(b), 15 U.S.C. § 1681d(b) (1970). Providing the consumer with a copy of a standardized form used to transmit the information from the reporting agency to the user would apparently suffice to comply with this requirement. Excerpts from FTC Informal Staff Opinion

information, other than public record information, may not be used again in subsequent investigative reports unless it is verified in the course of preparing such a report or has been received within three months of the time the subsequent report is furnished.[40]

Several other provisions of the FCRA designed to protect the consumer also deserve brief discussion. First, a reporting agency, with certain exceptions, is prohibited from reporting any adverse information on a consumer if the information is obsolete.[41] Basically, any adverse information which antedates a consumer report by more than seven years is considered obsolete,[42] except an adjudication of bankruptcy, which does not become obsolete until fourteen years following

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Letter of May 10, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,419 (1971). This additional disclosure must be mailed or otherwise delivered to the consumer within five days of the time his request is received. FCRA § 606(b), 15 U.S.C. § 1681d(b) (1970).

An investigative report for employment purposes involving a position for which the consumer has not applied is specifically exempted from both the notice and nature and scope disclosure requirements. *Id.* § 606(a)(2), 15 U.S.C. § 1681d(a)(2) (1970). This provision appears to reflect a congressional purpose to permit employers to consider persons for a job in secret before actually contacting an individual, and seems to be primarily applicable to situations in which the prospect is well-known in his occupation or profession, and the position involved is relatively important. If this is indeed a reasonable construction of this provision, a conflict arises between it and the disclosure requirements imposed upon the users of consumer reports under *Id.* § 615, 15 U.S.C. § 1681m (1970), discussed in the text accompanying notes 20-24 *supra*, which provides that a consumer must be advised whenever adverse action is taken, in whole or part, on the basis of a consumer report. The FTC staff, acknowledging that the two provisions appeared to be in conflict, resolved the dispute in favor of the consumer, opining that "disclosures were intended to be made every time a consumer has been denied a benefit because of information contained in a credit report." Excerpts from FTC Informal Staff Opinion Letter of April 22, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,485, at 89,447 (1971).

40. FCRA § 614, 15 U.S.C. § 1681*l* (1970).

41. *Id.* § 604(a), 15 U.S.C. § 1681c(a) (1970). It should be emphasized that a reporting agency is not required to delete such information from its files, but is only prohibited from reporting it, so that such information will still be in a consumer's file for possible use under circumstances not covered by the obsolescence provision. For example, the provisions proscribing the use of obsolete information are inapplicable to credit transactions involving a principal amount of $50,000 or more, to the purchase of insurance when a face amount of $50,000 or more is likely to be involved, and with respect to reports issued for employment purposes when the starting salary is likely to be $20,000 or more. *Id.* § 605(b), 15 U.S.C. § 1681c(b) (1970).

For a brief discussion of the amendments to section 604 made by the Congressional Conference Committee, see CONF. REP. at 4414-16.

42. FCRA § 605(a), 15 U.S.C. § 1681c(a) (1970). An extension of the seven year period can result in the case of suits and judgments, with respect to which the item may be noted on a report until the applicable statute of limitations has expired. *Id.* § 605(a)(2), 15 U.S.C. § 1681c(a)(2) (1970).

the date of adjudication.[43] The Act also imposes additional restrictions with respect to public record information furnished for employment purposes.[44] If such information is furnished, the reporting agency must either notify the consumer that it has reported such information and identify the person to whom such information has been reported[45] or, alternatively, "maintain strict procedures" to ensure that any adverse public record information is complete and up to date.[46] Finally, consumer reporting agencies must follow reasonable procedures to "assure maximum possible accuracy of the information" contained in consumer reports,[47] to ensure that consumer reports are used only for permissible purposes as provided by the Act,[48] and to verify the identity of prospective new users of reports and the purpose for which such reports are to be used.[49]

43. *Id.* § 605(a)(1), 15 U.S.C. § 1681c(a)(1) (1970). The FTC staff has opined that wage earner plans under Chapter 13 of the Bankruptcy Act will not be considered bankruptcies under this provision. COMPLIANCE WITH FCRA ¶ 11,306, at 59,791.

44. FCRA § 613, 15 U.S.C. § 1681k (1970).

45. *Id.* § 613(1), 15 U.S.C. § 1681k(1) (1970).

46. *Id.* § 613(2), 15 U.S.C. § 1681k(2) (1970). Items of public record are considered up to date if the current public record status of the information at the time the report is provided to the user is indicated. *Id.*

These provisions relating to public record information have been criticized both because they apply just to information used for employment purposes and because the means of compliance, notifying the consumer or ensuring the information is accurate, are inadequate. Note, *Fair Credit Reporting Act, supra* note 3, at 258-59. The first criticism is a legitimate one, but the second does not appear to take cognizance of the fact that when public record information is included in either consumer reports or investigative consumer reports, it is also subject to all the other disclosure and verification requirements imposed upon such reports by the FCRA.

47. FCRA § 607(b), 15 U.S.C. § 1681e(b) (1970). While the law does not specify what procedures must be followed to ensure accuracy, the FTC staff has indicated that the following factors are significant: (1) the proper training of personnel; (2) ascertaining the reliability of sources; (3) the proper recording and reproduction of data; (4) care that information is not used out of context; (5) proper security for data systems to prevent alteration or theft of information; (6) verification of adverse information by more than one source whenever possible; and (7) the absence of pressure on investigators to produce adverse reports. COMPLIANCE WITH FCRA ¶ 11,306, at 59,790-91.

48. Permissible purposes are set forth in text accompanying notes 50-63 *infra*. These purposes are discussed in text accompanying notes 105-14 *infra*.

49. FCRA § 607(a), 15 U.S.C. § 1681e(a) (1970). The FTC has indicated that every reporting agency should have some system by which it verifies that it is dealing with legitimate businesses that have a permissible purpose for using consumer reports. COMPLIANCE WITH FCRA ¶ 11,306, at 59,789. It suggests that users be required to contract or certify that they will use consumer reports only for permissible purposes and that records of such agreements or certification be maintained by the reporting agency. *Id.* For regular users of reports an initial contract or certification is sufficient, and this process need not be repeated with respect to each report requested. *Id.* The checking of references and on-site visits are recommended with respect to new users with whom the reporting agency is not familiar. *Id.*

Limitations on the use of a consumer report. It must be noted at the outset that the FCRA is applicable only to consumer reports.[50] Moreover, the FCRA specifically limits the purposes for which consumer reports may be used.[51] In section 603 the term "consumer report," is defined as:

> . . . any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604.[52]

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50. Congressional intent that the FCRA should apply to consumer reports, and not business or commercial reports is rather clear. The Report of the Senate Committee on Banking and Currency states ". . . the bill does not cover business credit reports or business insurance reports." S. REP. NO. 517, at 1. This limitation was reiterated by Senator Proxmire in his description of the bill to the Senate, 116 CONG. REC. S17635 (daily ed. Oct. 9, 1970), and again by Congressman Bow and Congresswoman Sullivan in the discussion of the FCRA in the House of Representatives. 116 CONG. REC. H10052-53 (daily ed. Oct. 13, 1970). This evidence of Congressional intent has been duly noted by the FTC. See Excerpts from FTC Informal Staff Opinion Letter of April 22, 1971, note 39 *supra* at 89,445. *But see* Anonymous v. Dun & Bradstreet, 40 U.S.L.W. 2162 (N.Y. Sup. Ct., N.Y. City. Sept. 28, 1971), in which Dun & Bradstreet was ordered to expunge certain obsolete information from a *business* report on a single-shareholder corporation, notwithstanding the court's clear recognition that the report was not within the scope of the FCRA. The decision was justified on the basis of the public policy of the FCRA—"that obsolete information should not be utilized in credit reports to the detriment of an individual . . . ." *Id.*

Title V of Public Law 91-508, see note 9 *supra*, which regulates the issuance and use of credit cards, has also been held to be inapplicable to credit cards used for business or commercial purposes, *see* Excerpts from FRB Letters of June 4, 1971 & July 15, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ ¶ 30,682 & 30,708, although there are indications that Congress intended no such result. *See* CONSUMER REPORTS, Nov. 1971, at 645. This limitation, which is not apparent from the provisions of title V themselves, results because title V was an amendment to the Truth in Lending Act, *see* Act of Oct. 26, 1970, and thereby made part of subchapter I of the Consumer Protection Act. Section 104 of the Truth in Lending Act, 15 U.S.C. § 1603 (1970), provides in pertinent part as follows: "This subchapter does not apply to the following: (1) Credit transactions involving extensions of credit for business or commercial purposes . . . ." This particular reason is not a ground for holding the FCRA inapplicable to commercial transactions, however, because it was added as a new title at the end of the Consumer Credit Protection Act, *see* Act of Oct. 26, 1970, Pub. L. No. 91-508, § 601, 84 Stat. 1136 and has been designated as a separate subchapter III by the codifiers.

51. See FCRA § 604, 15 U.S.C. § 1681b (1970) (permissible purposes of consumer reports).

52. *Id.* § 603(d), 15 U.S.C. § 1681a(d) (1970). The term "consumer report" does not include a report containing information based solely on transactions or experiences between the person making the report and the consumer, nor does it include any specific denial or extension of credit by the issuer of a credit card. *Id.*; *see* Excerpts from FTC Informal Staff Opinion Letter of April 8, 1971, note 21 *supra*, at 89,479 and Excerpts from FTC Informal Staff Opinion Letter of April 22, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,486 at 89,477 (1971).

Included among the permissible purposes in section 604 are those specifically itemized above in connection with the definition of the term "consumer report"—the extension of credit[53] or purchase of insurance for personal, family, or household purposes[54] and the determination of eligibility for employment purposes.[55] Additional purposes for which consumer reports may be used are for the review or collection of an account of the consumer[56] and for determination of a consumer's eligibility for a license or other governmental benefit.[57] Finally, a user may request a consumer report when he "otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."[58] In view of the ap-

53. FCRA § 604(3)(A), 15 U.S.C. § 1681b(3)(A) (1970).

54. *Id.* § 604(3)(C), 15 U.S.C. § 1681b(3)(C) (1970).

55. *Id.* § 604(3)(B), 15 U.S.C. § 1681b(3)(B) (1970). Other circumstances under which consumer reports may be furnished, not discussed in the text below, are in response to a court order, *Id.* § 604(1), 15 U.S.C. § 1681b(1) (1970), and in accordance with the written instructions of the consumer, *Id.* § 604(2), 15 U.S.C. § 1681b(2) (1970).

56. FCRA § 604(3)(A), 15 U.S.C. § 1681b(3)(A) (1970).

57. *Id.* § 604(3)(D), 15 U.S.C. § 1681b(3)(D) (1970). In addition to the permissible purposes discussed in this paragraph, a consumer reporting agency may also disclose to a governmental agency basic information related to identification, but limited to name, address, former address, and place or former places of employment, *Id.* § 608, 15 U.S.C. § 1681f (1970).

In a recent staff opinion, excerpts from FTC Informal Staff Opinion Letter of May 18, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,422, at 89,382 (1971), the FTC indicated that a consumer report requested by a state or federal revenue agency for the purpose of investigating tax fraud would be prohibited by the FCRA. This is readily apparent upon consideration of section 604 of the Act, 15 U.S.C. § 1681b (1970), which indicates that consumer reports may be used only for the purposes specifically listed therein, and no others. Notwithstanding the result described here, the FCRA has been criticized for failing adequately to protect an individual's privacy on the ground that administrative agencies could subpoena information and routinely have these subpoenas enforced by the courts. See Comment, *Agency Access to Credit Bureau Files: Federal Invasion of Privacy?, supra* note 11, at 123-24. Arguably such a procedure would meet the requirement of FCRA § 604(1), 15 U.S.C. § 1681b(1) (1970), which provides that a consumer report may be furnished in response to a court order. See note 55 *supra*. The FCRA contains no standards to guide a court in determining whether to enforce an administrative subpoena, but the policy considerations behind the Act are rather clear, see notes 13-19 *supra*, and it is clear that the strictures of the Act are intended to apply to governmental agencies. Consequently it seems premature to assume that courts will routinely grant subpoenas giving access to consumer reporting agency files. *But see* Comment, *Agency Access to Credit Bureau Files: Federal Invasion of Privacy?, supra*, at 112-18.

The Government's utilization of consumer reports is possibly limited by other statutory provisions as well. 5 U.S.C. § 3108 (1970) provides that no individual employed by the Pinkerton Detective Agency or a similar organization may be employed by the federal government. This prohibition is applicable to contracts or agreements with detective agencies as well as to individual employees of such agencies and precludes their employment regardless of the character of the services to be performed, whether investigative or not. Detective Employment Prohibition, 38 COMP. GEN. 881 (1959). Recently an Oklahoma management consultant filed suit under this statute in the United States District Court for the District of Columbia to prevent Retail Credit Company, alleged to be a private detective agency, from furnishing consumer reports to the federal government. *See* Washington Post, October 5, 1971, § C, at 7, cols. 1-2.

58. FCRA § 604(3)(E), 15 U.S.C. § 1681b(3)(E) (1970).

parent congressional intent to exclude business credit reports from the purview of the FCRA,[59] the meaning to be ascribed to this provision is unclear. It appears as if it were intended to be a catch-all for purposes which Congress intended to permit but neglected to itemize specifically, and could be reasonably so read if the words "business transactions" were merely assumed to mean "transactions" or "financial transactions or purposes."[60] The FTC staff, however, has read this provision more narrowly, as extending only to business transactions for personal, family, or household purposes.[61] To hold otherwise, in the FTC's view, would be to permit consumer reports to be used for purposes clearly not intended under the Act.[62]

Enforcement provisions of the act. Enforcement of the FCRA may occur on several levels. First, criminal sanctions are provided for obtaining consumer information from a reporting agency under false pretenses.[63] Similarly, the knowing disclosure of information from an agency's files by an officer or employee of a reporting agency to one not authorized to receive such information is made a criminal offense under the Act.[64] Secondly, the Act makes both consumer reporting agencies and users liable for negligent noncompliance[65] or willful non-

59. See note 51 *supra* and accompanying text.

60. The *Guidelines for Financial Institutions in Complying with Fair Credit Reporting Act, supra* note 13, at ¶¶ 11,201-09, seems to support this position in its choice of illustrations for section 604(3)(E). Suggested examples include a consumer who wishes to establish a checking account, and a builder checking the financial condition of a prospective buyer. *Id.* ¶ 11,203 at 59,760.

61. See notes 105-14 *infra* and accompanying text.

62. Excerpts from FTC Informal Staff Opinion Letter of May 27, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,444 at 89,400 (1971). But see notes 105-14 *infra* and accompanying text.

63. FCRA § 619, 15 U.S.C. § 1681q (1970). Apparently false representations as to either the purpose for which such information will be used or with respect to the identity of the person requesting the information would suffice to constitute a violation of this provision. The penalty stipulated is a fine of not more than $5,000 or imprisonment for not more than one year, or both. *Id.*

64. *Id.* § 620, 15 U.S.C. § 1681r (1970). Again the sanction is a fine of not more than $5,000, or imprisonment for not more than one year, or both. *Id.* The FCRA has been criticized for its failure to adequately protect the consumer's right to privacy. See Note, *Fair Credit Reporting Act, supra* note 3, at 259-61. Certainly these criminal sanctions reflect a congressional concern that consumer reports not be dispensed in a casual fashion or misused. However, it is asserted that prosecution is unlikely because "no one who would be subject to prosecution will voluntarily notify the consumer of the issuance of the illegal report, nor will he list it in his business records." *Id.* at 261 n.54. While this could be the case,the provision may be an effective deterrent. Few criminal statutes are adopted with the hope or expectation that those guilty of violating them will turn themselves in to law enforcement authorities.

65. FCRA § 617, 15 U.S.C. § 1681o (1970). This provision reflects a change requested by the House conferees on Public Law 91-508. The Senate bill imposed liability only in case of gross negligence. CONF. REP. at 4416.

compliance[66] with its provisions.[67] In the case of negligent noncompliance, the consumer is entitled to recover actual damages[68] and reasonable attorney's fees if the action is successful.[69] In the case of willful noncompliance the consumer may also recover punitive damages.[70] Such actions may be brought "in any appropriate United States district court without regard to the amount in controversy," or in any other court of competent jurisdiction.[71]

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66. FCRA § 616, 15 U.S.C. § 1681n (1970).

67. There has been extensive writing on the doctrine of conditional privilege which, as applied to credit reporting agencies, requires a plaintiff to prove actual malice on the part of a reporting agency in order to recover in an action for defamation. *See, e.g.*, Comment, *The Consumer vs. the Credit Bureau: Whom Does the Law Protect?, supra* note 6, at 219-22; Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy, supra* note 5, at 513-18; Note, *Protecting the Subjects of Credit Reports, supra* note 11, at 1050-54. As of 1971 only two states (Georgia and Idaho), which had considered the matter, had failed to grant such a privilege to credit reporting agencies. Note, *Protecting the Subjeets of Credit Reports, supra*, at 1050-51. Naturally, this doctrine has militated against recovery in such cases since express intent to harm is normally difficult to prove. The approach taken by the FCRA is different. The Act requires reporting agencies and users to maintain *reasonable procedures* to ensure compliance. See FCRA §§ 606(c), 607, 615(c), 15 U.S.C. §§ 1681d(c), 1681e, 1681m(c) (1970). One exception occurs in the public record information provisions, where *strict procedures* are required. *Id.* § 613(2), 15 U.S.C. § 1681k(2) (1970). Civil liability is then imposed for failure to maintain the kind of procedures required by the Act. *Id.* §§ 616, 617, 15 U.S.C. §§ 1681h, 1681o (1970). Thus, as suggested in one criticism, it is possible for "a reasonably accurate credit bureau [to] send an erroneous report to a user which has reasonable notification procedures, but . . . fails to notify . . ." with the result that neither the reporting agency nor the user is liable. Note, *Protecting the Subjects of Credit Reports, supra*, at 1067. Such a result is inevitable under a negligence theory, for to do otherwise would be to impose strict liability. On the other hand, with the assistance of appropriate discovery procedures, the consumer is much more likely to be able to prove that a given procedure is unreasonable or ineffective, than he is to prove that a reporting agency or user harbored malice, and to this extent the FCRA places him in a more favorable position. In addition, of course, the consumer retains the right to have inaccurate information corrected. See text accompanying note 28 *supra*.

Once a user or reporting agency discloses information to a consumer pursuant to the provisions of the FCRA, he is precluded from bringing an action in defamation, invasion of privacy, or negligence, except with respect to false information furnished with malice or intent to injure, and is relegated to showing either negligent or wilful noncompliance with the provisions of the Act. FCRA § 610(e), 15 U.S.C. 1681h(e) (1970). Such actions are not precluded, however, when the consumer obtains the information independently of agency or user disclosures. COMPLIANCE WITH FCRA ¶ 11,313, at 59,810.

68. FCRA § 617(1), 15 U.S.C. § 1681o(1) (1970).

69. *Id.* § 617(a), 15 U.S.C. § 1681o(2) (1970).

70. *Id.* § 616(3), 15 U.S.C. § 1681n(2) (1970). S. 823, the Senate bill, provided that punitive damages should not be less than $100 nor more than $1000. S. 823, 91st Cong., 1st Sess. § 606(2) (1969), *reprinted in supra* note 7, at 21. At the request of the House conferees the floor and ceiling on the amount of punitive damages were removed. CONF. REP. at 4416.

71. FCRA § 618, 15 U.S.C. § 1681p (1970). An action must be brought within two years from the time liability arises unless the defendant bas misrepresented information material to the establishment of his liability, in which case the action may be brought within two years after the misrepresentation has been discovered.

Responsibility for administrative enforcement of the FCRA is vested in the FTC[72] and in eight other administrative bodies.[73] With respect to the FTC, violation of the FCRA constitutes an "unfair or deceptive" act in commerce within the meaning of section 5(a) of the

72. *Id.* § 621(a), 15 U.S.C. § 1681s(a) (1970).

73. *Id.* § 621(b), 15 U.S.C. § 1681s(b) (1970). Compliance is enforced under section 8 of the Federal Deposit Insurance Act by the Comptroller of the Currency (with respect to national banks), the Federal Reserve Board (with respect to member banks of the Federal Reserve System other than national banks), and the Board of Directors of Federal Deposit Insurance Corporation (with respect to banks insured by the FDIC other than members of the Federal Reserve System). *Id.* § 621(b)(1), 15 U.S.C. § 1681s(b)(1) (1970). The Federal Home Loan Bank Board is charged with enforcing compliance, acting either directly or through the Federal Savings and Loan Insurance Corporation, with respect to institutions subject to section 5(d) of the Home Owners Loan Act of 1933, institutions subject to section 407 of the National Housing Act, and institutions subject to sections 6(i) and 17 of the Federal Home Loan Bank Act. FCRA § 621(b)(2), 15 U.S.C. § 1681s(b)(2) (1970). The Administrator of the National Credit Union Administration is charged with enforcing compliance with respect to any Federal Credit Union subject to the Federal Credit Union Act. *Id.* § 621(b)(3), 15 U.S.C. § 1681s(b)(3) (1970). The Interstate Commerce Commission is charged with enforcing compliance with respect to any common carrier under its jurisdiction. *Id.* § 621(b)(4), 15 U.S.C. § 1681s(b)(4) (1970). The Civil Aeronautics Board is charged with enforcing compliance with respect to any air carriers or foreign air carriers subject to the Federal Aviation Act of 1958. FCRA § 621(b)(5), 15 U.S.C. § 1681s(b)(5). And the Secretary of Agriculture is charged with enforcing compliance with respect to activities subject to the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act). FCRA § 621(b)(6), 15 U.S.C. § 1681s(b)(6) (1970).

The foregoing itemization serves also to illustrate the broad scope of the FCRA. With such a large number of enforcement agencies it seems almost inevitable that conflicting interpretations and compliance provisions will be issued and that the quality of administrative enforcement will vary, depending to some extent on the interest of each agency in the FCRA. At the outset, however, it seems that this problem has been overcome, at least in part, as a result of cooperation among some of the agencies which resulted in the issuance of a single set of guidelines for all financial institutions. See note 13 *supra*. The Administrator of the National Credit Union Administration has issued a separate guide for compliance, but this is confined largely to a summary of the provisions of the FCRA and is not inconsistent with the guidelines issued by the FTC. See *NCUA Guide to Fair Credit Reporting*, P-H CREDIT UNION GUIDE, CONSUMER AND COMMERCIAL CREDIT ¶¶ 11,895-11,898 (May 28, 1971). The rationale behind this enforcement scheme seems to be a desire not to subject consumer reporting agencies and users of reports to regulation by more than one federal agency. *See* S. REP. NO. 517, at 7 which states: "Compliance would be further enforced by the Federal Trade Commission with respect to consumer reporting agencies and users of reports *who are not regulated by another Federal Agency*" (emphasis supplied). The wisdom of such an approach seems questionable inasmuch as there is no indication that such agencies as the Civil Aeronautics Board or the Interstate Commerce Commission have any particular expertise which qualifies them to administer the FCRA. Nor, on the other hand, would it seem anomalous for an airline or railroad to be subject to regulation by, for example, the FTC to the extent that they might engage in credit reporting or in using consumer reports. Consequently it seems that Congress might better have opted for uniform and consistent enforcement by one agency, such as the FTC.

FTC Act[74] and is subject to enforcement under section 5(b)[75] "irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act."[76] While the FTC is apparently not authorized to promulgate substantive rules with respect to the FCRA,[77] it may establish procedural rules, require the filing of reports, and conduct hearings and investigations.[78] The FTC's efforts to enforce the FCRA have been

74. 15 U.S.C. § 45(a) (1970). Similarly, with respect to the other eight administrative bodies involved in enforcing the FCRA, violations of the FCRA are deemed to be violations of the substantive provisions by which those agencies are governed. FCRA § 621(c), 15 U.S.C. § 1681s(c) (1970).

75. 15 U.S.C. § 45(b) (1970). This provision authorizes the FTC to issue cease and desist orders after proper notice, hearings, etc. Failure to comply after an order has become final may result in a civil penalty of not more than $5,000 for each violation, and in cases of continuing failure each day of continuance is deemed a separate offense. *Id.* § 45(l) (1970). A violator of the FCRA is subject to this penal provision. FCRA § 621(a), 15 U.S.C. § 1681s(a) (1970).

The eight other administrative agencies involved in enforcing the FCRA may also impose any sanctions on violators under their jurisdiction that they are otherwise authorized by law to impose. *Id.* § 621(c), 15 U.S.C. § 1681s(c) (1970).

76. FCRA § 621(a), 15 U.S.C. § 1681s(a) (1970).

77. *Id.* The statute provides that the FTC "shall have . . . procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance . . . ." Similarly, the pertinent FTC procedural rule indicates that Commission interpretations of the FCRA "are not substantive rules and do not have the force or effect of statutory provisions," but rather are like industry guides and advisory in nature. 36 Fed. Reg. 9294 (1971), *as amended*, *id.* at 18788 (interpretations: nature and purpose). While it would perhaps be desirable for the FTC to have substantive rule-making powers in that this would undoubtedly expedite its proceedings, the issuance of opinions, including informal staff opinions, seems to achieve almost the same result. The Commission indicates, for example, that failure to comply with its interpretations may result in corrective action. *Id.* For an example of an informal staff opinion which gives the appearance that the FTC is setting rates, see Excerpts from Informal Staff Opinion Letter of June 2, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,428 (1971), wherein, in response to an inquiry concerning what a reasonable fee for making disclosures under section 609 of the FCRA would be, it is carefully pointed out that the FTC does not have the authority to determine what a reasonable fee would be, but only to determine what would be an unreasonable charge. The opinion then goes on to indicate that the FTC has not made a determination that a $5.00 charge would be unreasonable. *Cf.* Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 200-09, for discussion of a case in which the Civil Aeronautics Board attempted to set rates in this same fashion in violation of prescribed rate-making procedure.

While one authority has indicated that the Act "does not . . . even authorize formulation of regulations to assist in its implementation . . . ," see Koon, *supra* note 12, at 54 n.6, section 621, 15 U.S.C. § 1681s(c) (1970), provides that each of the eight other agencies "may exercise . . . any other authority conferred on it by law," in order to secure compliance with the Act. This provision leaves in doubt precisely to what extent these agencies may act.

78. FCRA § 621(a), 15 U.S.C. § 1681s(a) (1970).

vigorous and aggressive,[79] and its activities in interpreting the Act provide much of the basis for the ensuing section of this note.[80]

The FCRA's Applicability to Business Credit Reports

Perhaps the most difficult and important problems presented by the FCRA are, first, determining precisely what it is that elevates information to the status of a consumer report[81] and, second, determining for what purposes a consumer report may be used.[82] These two problems are to be viewed in the context of two dominant aspects of congressional purpose—the desire to protect the consumer who is the subject of credit reports,[83] and the desire to exclude credit reports of a purely commercial nature from the purview of the Act.[84] It is within this larger context that the problem of the FCRA's applicability to credit reports on businesses must be discussed.

What is a "consumer report?" For purposes of clarity the definition of the term "consumer report" may be set forth schematically in pertinent part as follows:

79. Thus far enforcement efforts of the FTC have manifested themselves largely in the form of informal staff opinions and the staff publication of COMPLIANCE WITH FCRA. The views expressed in these statements are purely advisory and not binding in any way upon the Commission. 36 Fed. Reg. 9293-94 (1971) (examination, counseling and staff advice), *as amended, Id.* at 18788. A reading of these materials conveys the impression that the FTC is actively attempting to bring about compliance with the purposes of the FCRA with respect to both users and consumer reporting agencies. In a recent speech the director of the FTC's Office of Policy Planning and Evaluation explained that the issuance of informal staff opinions was only the first stage of the FTC's enforcement program. In the second stage, to begin shortly, the Commission itself will issue interpretations on the application of the FCRA. In the third stage, the FTC regional offices are expected to play a vital role in enforcement. 4 CCH CONSUMER CREDIT GUIDE, *Report Bulletin* 78, at 7 (Oct. 12, 1971).

80. The FCRA, although part of a growing federal presence in the area of consumer credit law, *see* Felsenfeld, *Competing State and Federal Roles in Consumer Credit Law*, 45 N.Y.U.L. REV. 487, 512-15 (1970), does not totally pre-empt state legislation on the same subject. FCRA § 622, 15 U.S.C. § 1681t (1970), provides that the FCRA exempts no one from compliance with state laws relating to credit information except to the extent that such laws are inconsistent with the FCRA, and then only to the extent of the inconsistency.

81. The definition of the term "consumer report" is set forth at note 52 *supra* and accompanying text.

82. The purposes for which a consumer report may be permissibly used are set forth at notes 53-58 *supra* and accompanying text.

83. See notes 13-15 *supra* and accompanying text.

84. See note 50 *supra* and accompanying text.

The term "consumer report" means . . . any communication
of any information
which is
used
or expected to be used
or collected in whole or in part for the purpose of
serving as a factor in establishing the consumer's eligibility . . . .[85]

The foregoing scheme indicates, at the outset, that an item of information does not attain the status of a consumer report unless the information is *communicated.* The clause "used or expected to be used or collected in whole or in part," however, apparently refers to the antecedent "information" rather than to the word "communication" or the noun phrase "communication of any information," since it makes little sense to speak of a communication, whether described in one word or four, which is "collected in whole or in part." This means that while an item of information does not attain the status of a consumer report until communicated, the information which will *become* a consumer report if communicated is defined both in terms of its use or expected use after the communication *and* in terms of the purpose for which it was collected prior to the communication.

The Senate report accompanying the FCRA indicates that the Act "covers reports on consumers when used for obtaining credit reports or business insurance or employment," but that it does not extend to "business credit reports or business insurance reports."[86] This description appears to envisage a "use" standard for consumer reports, i.e., a requirement that a report's contemplated use be for a consumer purpose before the report attains the status of a consumer report. Such a reading of the definition of consumer report can certainly be justified with respect to the phrase "used or expected to be used," since a consumer report, up to this point, is simply defined as any communication of any information which is used or expected to be used[87] for one of the enumerated purposes.[88] The "use" standard for

85. FCRA § 603(d), 15 U.S.C. § 1681a(d) (1970). For the complete definition of "consumer report," see text accompanying note 52 *supra.*

86. S. REP. No. 517.

87. The phrase "expected to be used" is undoubtedly intended to cover the situation in which the user of the consumer report misuses the information contained therein, despite his certification or promise that he would use it only for purposes permitted under the Act.

88. The analogous language of the initial drafts of both S. 823 and H.R. 16340 contained definitions of "consumer report" which required that information actually be communicated by a consumer reporting agency before the definition was met. S. 823 provided: "[t]he term 'credit report' means any written, oral, or other communication of any credit rating, or of any information which is sought or given for the purpose of serving as a basis for a credit rating." S. 823, 91st Cong., 1st Sess. § 163(c) (1969), *reprinted in Hearings on S. 823, supra* note 8, at 6. With respect to the second clause of this definition, it seems clear that the word "communication" is to be read in tandem with the word "information" so as to mean "or other communica-

determining what constitutes a consumer report breaks down, however, with respect to information "*collected in whole or in part*"[89] for consumer purposes since this phrase can have reference only to the purpose for which the information was originally gathered, quite apart from its eventual use. Hence the "or collected . . ." language appears to establish an additional and independent "original purpose" test, which focuses on the intent of the gatherer at the time of collection, for ascertaining whether information subsequently communicated is a consumer report.[90] Significantly, the Senate report accompanying the FCRA also contains language which supports such a reading of the "or collected . . ." provision: "[a] 'consumer report' is defined . . . as a report on an individual when the information *has been collected or is to be used* for credit, insurance, or employment purposes."[91]

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tion . . . of any information." H.R. 16340 provided: "[t]he term 'consumer report' means any written, oral or other communication of any information bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living and which is used or expected to be used as a factor in establishing the individual's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes; or (2) employment." H.R. 16340, 91st Cong., 2d Sess. § 13(c) (1970), *reprinted in Hearings on H.R. 16340, supra* note 7, at 3. The definition of "consumer report" finally enacted appeared in the amended version of S. 823 adopted by the Senate in 1969 and was not subsequently changed.

89. See text accompanying note 85 *supra*.

90. It must be made clear here that it is not contended that a consumer report exists independent of the communication of the information in question, but rather that a communication of information, when the information contained therein was originally collected for the purpose of future use in a consumer report, is a consumer report regardless of the use to which the communication is to be put by the user. This is in direct contrast, and a significant supplement, to the "use" test provision, under which information collected for any purpose at all, but subsequently communicated for the purpose of establishing the consumer's eligibility for credit or another benefit, is a consumer report.

The "or collected" language has been largely overlooked by commentators. *See, e.g.*, Koon, note 12 *supra* at 53, wherein it is recognized that reports may fall within the scope of the FCRA "without regard to the purpose for which the report is sought," but presumably only because of the reference in the definition of "consumer report" to section 604's permissible purposes, one of which is for a legitimate business need for the information in connection with a business transaction involving the consumer. Ignored entirely in the footnote paraphrase of the definition of a consumer report is the "or collected" language. *Id.* at 53 n.5. Moreover, it is not entirely clear that the reference in the definition of consumer report to 604(3)(E) is, as the author contends, "likely a creature of inattentive draftsmanship rather than design," *id.*, since the "or collected in whole or in part" language itself brings reports within the scope of the Act without regard to the purpose for which the report is sought.

91. S. REP. No. 517 (emphasis added).

The FTC staff has adopted precisely the reading of the "or collected" language suggested above:

> A reporting agency or requesting party cannot contend that the law does not apply because the report will be used for some purpose *other* than credit, insurance or employment and, therefore, it is not a 'consumer report.' The law applies because the information was *collected* by the agency for one or more of the permissible purposes and, therefore, it is not available except for those purposes.[92]

In support of the FTC's view it is to be noted that several other sections of the FCRA likewise regulate information gathered by a consumer agency from the time it is collected. As was earlier described, for example, when a consumer receives disclosures from a consumer reporting agency, the reporting agency must disclose "[t]he nature and substance of all information (except medical information) in its files on the consumer . . . ."[93] Similarly the procedures for correcting disputed information[94] clearly extend to all the information in a consumer's file,[95] and not just to information included in a consumer report. There can be no doubt that all information collected by a reporting agency is subject to some degree of regulation under the FCRA;[96] hence it cannot be argued that the FTC staff reading of the "or collected" language unduly broadens the scope of the Act. The only alternative to the FTC interpretation would be to adopt solely a "use" requirement[97] in defining a consumer report and to disregard entirely the words "or collected." To ignore this language would not be appropriate in view of the very careful scrutiny given the provisions of the FCRA by both the credit information industry and the Senate drafters.[98]

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92. COMPLIANCE WITH FCRA ¶ 11,306, at 59,789.

93. FCRA § 609(a)(1), 15 U.S.C. § 1681g(a)(1) (1970); see discussion of the disclosure provisions at notes 20-24 *supra* and accompanying text. The term "file" as used in this provision means "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." FCRA § 603(g), 15 U.S.C. § 1681a(g) (1970).

94. See notes 25-31 *supra* and accompanying text.

95. FCRA § 611(a), 15 U.S.C. § 1681i(a) (1970).

96. This includes information collected prior to the effective date of the Act. See Excerpt from FTC Informal Staff Opinion Letter of April 7, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,523 (1971).

97. See text following note 86 *supra*.

98. The consumer credit industry participated actively in drafting S. 823 in its amended form, and apparently there were "hours and hours of negotiations" over a period of several months on the bill. Denny, *supra* note 9, at 584. This account is substantially confirmed by Senator Proxmire. See 115 CONG. REC. 33410 (1969) (remarks of Senator Proxmire). *But see* 116 CONG. REC. H10053-56 (daily ed. Oct. 13, 1970) (remarks of Congressmen Bow, Widnall, and Wylie).

The practical result of the "original purpose" test[99] is to render any information communicated by a consumer reporting agency—so long as it was collected for consumer purposes[100]—a consumer report within the meaning of the FCRA. This result has been acknowledged in an FTC staff opinion which indicates that "no report prepared for business purposes may contain information collected for the purpose of making consumer reports, or the entire report becomes a consumer report."[101] And again: "if . . . information . . . originally collected for consumer purposes . . . [is] subsequently used in a business credit or business insurance report, then such a report would become a consumer report as defined in the Act."[102] Assuming then, hypothetically, that a consumer reporting agency wanted to enter the business credit reporting field,[103] and that no other provisions of the FCRA stood in its way, it would have two means of doing so. The first would be to collect the information it planned to use for business reporting purposes jointly with consumer information and utilize the same storage facilities for such data, but to comply with all the requirements of the FCRA in dispensing such information. A second means would be to establish a parallel or separate organizational structure, not only for the storage of data, but for its collection and handling as well.[104]

99. See text accompanying notes 89-90 *supra*.

100. Even if the information was not collected for use in consumer reports, it would, of course, be subject to the requirements of the Act if it were nonetheless ultimately used in a consumer report. See note 90 *supra*.

101. Excerpts from FTC Informal Staff Opinion Letter of May 18, 1971, *supra* note 57, at 89,382.

102. Excerpts from FTC Informal Staff Opinion, Letter of May 19, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,424, at 89,384 (1971).

103. This possibility seems not unlikely in view of the fact that consumer reporting agencies so doing would have two natural advantages—expertise in collecting credit data and a large data base upon which to found such an operation. *See, e.g.*, Pogue v. Retail Credit Co., ___ F.2d ___ (4th Cir. 1972) (action against a consumer reporting agency for an alleged breach of contract with respect to a report on a loan company).

104. Establishing such a separate organizational structure would undoubtedly reduce the natural advantages a consumer reporting agency would have in entering the commercial reporting field, note 103 *supra*, and limit them to management expertise.

It is arguable that consumer reporting agencies could comply with the Act by segregating data before storage and, by placing the same data in separate storage banks, take the data from one bank when intended for use in consumer reports, and from another when intended for use in commercial reports. Indeed, the FTC staff indicates that "[i]n many cases consumer reporting agencies are performing both functions although from separate sets of data banks." Excerpts from FTC Informal Staff Opinion Letter of June 4, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,451 at 89,403 (1971). The FTC staff, however, points out that this practice may be impermissible, *id.*, and under its reading of the definition of "consumer report" this view is

How may a consumer report be used? Whether a consumer reporting agency can even enter the commercial reporting field, however, depends upon the construction given section 604,[105] the "permissible use" provision of the Act. Consumer reports may primarily be used for credit, insurance, or employment, involving the consumer. In addition, section 604(3)(E) provides that consumer reports may be furnished to a person who "otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."[106] The FTC staff has construed the latter provision narrowly, indicating that it authorizes the use of consumer reports only for business transactions undertaken for personal, family, or household purposes.[107] Because consumer reports may be used for "no other" purposes than those specified in section 604,[108] if the foregoing FTC staff interpretation of section 604(3)(E) is correct, consumer reporting agencies would be wholly precluded from issuing consumer reports for all but a limited number of business transactions.[109] There are several persuasive reasons why such a restrictive interpretation should not be adopted. First, it must be observed that the FTC staff reading of section 604(3)(E) gives a paradoxical meaning to the phrase "or collected in whole or in part" in section 603(d) of the Act[110] since any information collected *in part* for consumer purposes could thereafter be used *only* for consumer purposes. That this meaning was unintended by the FTC is evident from the fact that the FTC staff itself has on occasion indicated in staff opinions that consumer reports could be used for commercial purposes so long as the provisions of the Act are complied with.[111]

A second reason why the FTC staff interpretation of section

undoubtedly correct, inasmuch as information collected for use in consumer reports is still collected for use in consumer reports no matter how many storage banks it is placed in. To permit separate data banks to obviate the need for compliance with other provisions of the Act would be a sham, since its only regulatory effect would be to impose the cost of an additional data bank on consumer reporting agencies, after which they could proceed to use the business information without further regulation.

105. 15 U.S.C. § 1681b (1970).

106. *Id.* § 1681b(3)(E) (1970).

107. See notes 61-62 *supra* and accompanying text.

108. 15 U.S.C. § 1681b (1970).

109. The one exception to this would occur when a consumer gave written authorization that a report on him could be used for some other purpose. FCRA § 604(2), 15 U.S.C. § 1681b(2) (1970).

110. 15 U.S.C. § 1681a(d) (1970).

111. See notes 101-02 *supra* and accompanying text.

604(3)(E) appears unduly restrictive is indicated by a reading of that provision itself. The word "consumer" is defined in the Act as "an individual."[112] Substituting the latter term for the word "consumer" in the definition, the Act in plain language authorizes the use of consumer reports with respect to "a business transaction involving an individual." To insert a "personal, family, or household" limitation in this context results in a substantive alteration of the language, and does not appear to be warranted.

It is also pertinent to inquire whether the FTC staff reading of section 604(3)(E) in any way enhances or contributes to the regulatory scheme established by the FCRA. The effect of such an interpretation is to prevent consumer reporting agencies from issuing reports in connection with a transaction involving a sole proprietorship, a single-shareholder corporation or any other business entity involving an individual where the transaction was not undertaken for a personal, family or household purpose. To the extent that a need for information provided in this context exists, it will almost surely be provided by business reporting agencies which are entirely unregulated in their operations if consumer reporting agencies cannot do so.[113] While it seems clear that Congress did not intend to regulate the business credit reporting field,[114] at the same time there is no evidence that Congress intended to close this field to consumer reporting agencies which comply with the provisions of the FCRA.

At some time in the future a court will be confronted with the problem of interpreting the FCRA. When it does so it should not confront the "or collected in whole or in part" clause or the FTC interpretation of section 604(3)(E) without being cognizant of the interrelation of the two provisions. By giving the "or collected . . ." language a broad construction, rather than entirely disregarding it, the courts would ensure that the protective provisions of the FCRA are applicable to all transactions involving the consumer. At the same time, by disregarding the restrictive interpretation of section 604(3)(E) advanced by the FTC, a court would ensure that the business operations of consumer reporting agencies are not unduly cur-

112. FCRA § 603(c), 15 U.S.C. § 1681a(c) (1970).

113. *See, e.g.*, Pogue v. Retail Credit Co., ___ F.2d ___ (4th Cir. 1972), a pre-FCRA case in which both Retail Credit Co. and Dun & Bradstreet issued credit reports on a loan company.

114. See note 54 *supra* and accompanying text.

tailed and that consumer reporting agencies could compete in the commercial credit field, subject to the requirements imposed by the FCRA.